Supreme Court, U.S.
FILED
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-15

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court acted within its discretion in excluding testimony of an expert witness that would have been based on what he believed he heard on audiotapes that were played for the jury.

2. Whether the district court acted within its discretion in prohibiting defense counsel from asking certain questions during the three-day cross-examination of a prosecution witness.

3. Whether the district court properly admitted co-conspirator statements in the absence of any Confrontation Clause objection.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-6A) is reported at 787 F.2d 1086.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1986. A timely petition for rehearing was denied on May 6, 1986. The petition for a writ of certiorari was filed on July 7, 1986, and is therefore out of time under Rules 20.1 and 29.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of 23 counts of mail fraud, in violation of 18 U.S.C.

1341; 23 counts of interference with commerce by means of threats or violence, in violation of 18 U.S.C. 1951; and one count of racketeering, in violation of 18 U.S.C. 1962(c). He was sentenced to concurrent terms of 15 years' imprisonment. The court of appeals affirmed (Pet. App. 1A-6A).

1. The evidence at trial showed that petitioner, a state court trial judge in Chicago, Illinois, fixed cases in exchange for money from attorneys. In one scheme, petitioner appointed selected attorneys to represent defendants whose cases were assigned to petitioner's court, awarded fees to the attorneys from the defendants' bond money, and fixed the cases in exchange for one-third of the fee. Three attorneys testified that they either paid money to petitioner or were "shaken down" by petitioner while he was a criminal court judge. Pet. App. 2A.

In another scheme, which occurred after petitioner switched from criminal court to traffic court, attorney Terrence Hake gave money to petitioner or petitioner's court assistant, Harold Conn, on three separate occasions in exchange for decisions favorable to Hake's clients. Petitioner was unaware that Hake was an FBI undercover agent during the FBI's "Operation Greylord," which investigated corruption in the Chicago state court system. Hake posed as a corrupt defense attorney who would bribe judges in return for favorable decisions. Pet. App. 2A.

During his dealings with petitioner and Conn, Hake wore a "body bug" to record their incriminating statements. In Hake's first transaction with petitioner and Conn, Conn requested $150 for the judge and whatever amount Hake wished to give Conn in exchange for a decision by petitioner favorable to one of Hake's clients. Conn also explained why petitioner's ruling was favorable to Hake, and he identified some of the "bad" judges in the state court system. On that occasion, Hake gave Conn $150 for petitioner and $50 for Conn. Tr. 1386-1388; GXs Benson 1, 1A.

On the second occasion, Hake delivered $260 to Conn after petitioner had issued a decision favorable to Hake's client. During the exchange, Conn told Hake that petitioner wanted $200 for his decision and that Conn had assisted petitioner in ruling in favor of Hake's client by falsifying a court document. On the third occasion, Hake delivered $100 to petitioner following a ruling by petitioner favorable to Hake's client. Petitioner accepted the money and told Hake that the amount was sufficient. Tr. 1404, 1427, 1432, 1433, 1437-1440, 1447, 1455-1456; GXs Cramer 1, 1A, 2, 2A; Group Exh. 46.

To counter the impact of the recorded conversations, petitioner offered the testimony of Dr. Robert Shuy, a linguist with expertise in "contextual analysis." During a proffer, Shuy testified that he had listened to the tape recordings and had read the transcripts of the tapes that Hake had prepared. On the basis of listening to the tapes, Shuy differed with Hake as to the contents of the conversations. As became clear on voir dire, Shuy did not use contextual analysis in reaching his opinions about what was said, but proposed to testify as an "expert listener" without regard to the context of the conversation. When questioned by the court, Shuy agreed that, if defense counsel played the tapes to the jury and suggested defendant's versions of the words at issue, that would serve the same purpose as Shuy's proffered testimony. Pet. App. 2A-3A; Tr. 2476-2477, 2558-2560.

In a written opinion issued December 17, 1984, the district court excluded Shuy's testimony for two reasons. First, petitioner had failed to comply with Fed. R. Crim. P. 16(b)(1)(B) by withholding Shuy's report of his examination of the taped conversations from the government, thereby preventing the government from preparing an effective rebuttal to Shuy. Second, the court concluded that Shuy's

testimony would not have provided the jury with "significant help in understanding the evidence," because the jury was capable of understanding the contents of the recorded conversations. During cross-examination of Hake, however, the court allowed petitioner to play the tapes on equipment identical to that used by Shuy. In addition, the court deleted those conversations that petitioner contested from the transcripts that were given to the jury during deliberations. Pet. App. 2A-3A.

To impeach Hake's credibility, petitioner attempted to show that Hake's procedures for recording petitioner's conversations were different from his recording procedures in other cases in which Hake posed as a recipient of bribes from corrupt attorneys. In this case, petitioner did not confirm each bribe on the tapes after he gave the money to petitioner or Conn. In the other cases, Hake had made statements on the tapes confirming the receipt of money from the bribe-givers. During the three-day cross-examination of Hake (see Pet. App. 5A), defense counsel was allowed to ask a number of questions about the difference between instances in which Hake did confirm bribes and instances in which Hake did not confirm bribes (Tr. 1500-1504, 1515-1519, 1521, 1525, 1535, 1544, 2157). Defense counsel argued the significance of this point in closing argument (Tr. 2661, 2721, 2738).

The district court, however, regarded as only marginally relevant the difference between Hake's conduct as a bribe-taker and his conduct as a bribe-giver. As the court noted, a bribe-taker, unlike a bribe-giver, may confirm a receipt of money, without arousing suspicions, by thanking the giver. The district court therefore refused to permit several questions directed to this issue on grounds of relevance and waste of time. The court pointed out that the already lengthy cross-examination of Hake would be further protracted if defense counsel were permitted to inquire into

each of the 23 taped conversations in which Hake had received bribe money. Pet. App. 5A; Tr. 1566-1567, 1667-1668.

During the trial, petitioner objected on hearsay grounds to the admission of Conn's statements to Hake. The district court admitted Conn's statements as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E). Petitioner did not ask the district court to conduct a separate inquiry into the reliability of the statements in order to determine whether their admission would violate the Confrontation Clause. Petitioner also objected on hearsay grounds to the admission of statements by attorney Harry Klepper to policeman Joseph Trunzo. Trunzo testified that he was a conduit for bribes between petitioner and attorneys. On two occasions, Klepper gave envelopes to Trunzo and angrily told him to give them to petitioner. The district court admitted Klepper's statements as nonhearsay because they were offered not to prove the truth of the matter asserted but to explain Trunzo's conduct. Pet. App. 4A-5A; Tr. 1347, 1355, 2192-2196.

2. The court of appeals affirmed (Pet. App. 1A-6A). First, the court held that the district court properly excluded Shuy's testimony because Shuy's testimony was based only on listening to the tapes and not on his expertise and therefore would not help the jury (*id.* at 2A-3A). The court also upheld the district court's rulings that Conn's statements were properly admitted under Fed. R. Evid. 801(d)(2)(E) and that Klepper's statements were not hearsay (Pet. App. 4A-5A). Petitioner had not contended that the admission of those statements violated the Confrontation Clause, and the court therefore did not address any Confrontation Clause question. Finally, the court held (*id.* at 5A) that the district court had not abused its discretion in limiting petitioner's cross-examination of Hake. Noting that petitioner was permitted extensive cross-examination of Hake over a three-day period, the court found that the

district court did not err by limiting petitioner's questions about Hake's failure to make confirming statements during some of the tape-recorded conversations.

ARGUMENT

As a preliminary matter, all of petitioner's challenges to his conviction are limited to the RICO count and those extortion counts that involved undercover agent Hake and petitioner's actions as traffic court judge. On those counts, petitioner received sentences that were concurrent with his sentences on the mail fraud and other extortion counts. In these circumstances, review of petitioner's claims is unwarranted because even complete acceptance of all of petitioner's arguments would give him no practical benefit. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

1. Petitioner first contends (Pet. 16-24) that the district court's exclusion of Shuy's testimony violates Fed. R. Evid. 702. Yet, as this Court has recognized, "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous" (*Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962)). The action of the district court in this case was not manifestly erroneous. The issue was simply what was said on tapes that were played to the jury. Shuy's expertise in "contextual analysis" could not help the jury understand what was said, for Shuy admitted that he would base his testimony simply on what he heard, not on contextual analysis. In ruling that playing the tapes to the jury would serve the same purpose as allowing Shuy to testify, the court correctly concluded that "the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject" (Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 418 (1952), quoted in Fed. R. Evid. 702 advisory committee note).

Other courts of appeals have upheld the exclusion of linguists' testimony. See, *e.g.*, *United States* v. *DeLuna*, 763 F.2d 897, 912 (8th Cir. 1985), cert. denied, No. 85-423 (Nov. 12, 1985); *United States* v. *Schmidt*, 711 F.2d 595, 598-599 (5th Cir. 1983), cert. denied, 464 U.S. 1041 (1984); see also *Chesebrough-Pond's, Inc.* v. *Faberge, Inc.*, 666 F.2d 393 (9th Cir.), cert. denied, 459 U.S. 967 (1982). The cases on which petitioner relies (Pet. 20) involve expert interpretation of surveillance photographs, a field in which the utility of expert testimony is more widely acknowledged (see 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[02], at 702-10 to 702-11 (1985)). In any event, those cases hold only that the admission of expert testimony in the circumstances of each case was not clearly erroneous.*

Finally, there is no merit to petitioner's assertion (Pet. 21-24) that the exclusion of Shuy's testimony prevented him from presenting his version of the taped conversations to the jury. In addition to conducting a three-day cross-examination of Hake, petitioner received extraordinary procedural protections so that he could present his version of the conversations (see page 4, *supra*).

2. Petitioner also contends (Pet. 25-28) that the district court restricted his cross-examination of Hake in violation of the Sixth Amendment. This fact-bound question merits no further review.

Under the Confrontation Clause, a defendant has the right to cross-examine a government witness to impeach his credibility (*Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986)). A district court, however, may restrict cross-examination that is repetitive or harassing, confuses the

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*Even if the district court's application of Rule 702 in this case were manifestly erroneous, its ruling would still be correct because of petitioner's failure to comply with Fed. R. Crim. P. 16(b)(1)(B) by not disclosing Dr. Shuy's reports and notes to the government before trial.

issues, or is only marginally relevant (slip op. 6; see also Fed. R. Evid. 403). The district court's rulings were consistent with those guidelines.

The district court allowed petitioner to ask Hake about his failure to confirm his bribe-giving to petitioner or Conn on the tapes and to argue to the jury the significance of that failure. The court restricted petitioner only from delving at length into Hake's other investigations and from asking Hake argumentative questions about his reasons for failing to make confirming statements on some of the tapes in this case. Rather than holding those questions entirely irrelevant, the trial judge advised the jury that it could consider differences between the tapes, and the judge allowed defense counsel to argue the point to the jury (see Tr. 2146). The court was correct, however, in holding that the difference between Hake's role as bribe-taker and his role as bribe-giver rendered questions about Hake's conduct in earlier cases no more than marginally relevant. It was therefore proper for the court to curtail the lengthy cross-examination of Hake accordingly.

3. Petitioner also contends (Pet. 29-31) that the district court did not comply with the Confrontation Clause when it admitted Conn's and Klepper's statements as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E) without requiring the government to show that the statements bore specific indicia of reliability. Although petitioner correctly notes that the courts of appeals are divided on this issue, this case does not warrant review.

Klepper's statements were not admitted for the truth of any matters asserted in the statements but were instead admitted as nonhearsay to explain Trunzo's conduct. Thus, Klepper's statements do not implicate the Confrontation Clause at all (see *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 11 n.11).

Although some of Conn's statements were admitted for the truth of the matters asserted, petitioner did not preserve below any objection to those statements on the basis of the Confrontation Clause, nor did he identify the particular statements he wished to challenge. Petitioner therefore may not raise the issue here. See *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Gibbs*, 739 F.2d 838, 846-848 (3d Cir. 1984) (en banc), cert. denied, No. 84-364 (Jan. 7, 1985).

Moreover, Conn's statements were reliable under any standard. On both occasions when Hake met with Conn to make payoffs, petitioner had directed Hake to "see [Conn]" after the court proceedings were over (GXs Benson 1, 1A; GXs Cramer 1, 1A). On the third occasion when Hake made a payment in connection with one of his cases, he made it directly to petitioner (GXs Cramer 2, 2A). The payment was made in connection with further proceedings in a case on which Hake had previously made a payment to petitioner through Conn. In light of petitioner's acceptance of money directly from Hake on one occasion and his conduct in referring Hake to Conn to make payments on other occasions, Conn's statements confirming that the payments were going to petitioner were well corroborated and thus shown to be reliable.

In addition, Conn's statements related to contemporaneous events about which Conn had first-hand knowledge. There was therefore no risk that the statements might be unreliable because of inaccuracies in Conn's recollection of past events. Finally, Conn had no reason to lie, because Conn was expecting bribe money from Hake on a continuing basis, and Conn would only have jeopardized any future payments if he had lied to Hake. In these circumstances, Conn's statements would have been admitted even in the courts that require an independent analysis of the reliability of co-conspirator declarations under the Confrontation Clause. See *United States* v. *DeLuna*, 763 F.2d at 910 (discussing indicia of reliability).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1986